IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. MICHAEL KEVIN BLACKSTOCK, Petitioner.	2 CA-CR 2007-0286-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044221

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Respondent

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena
Tucson
Attorneys for Petitioner

H O W A R D, Presiding Judge.

¶1 Petitioner Michael Blackstock pled guilty to continuous sexual abuse of a child and sexual conduct with a minor under the age of fifteen. The trial court sentenced him to the presumptive term of ten years' imprisonment on the continuous sexual abuse charge and lifetime intensive probation supervision on the sexual conduct charge. Blackstock filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court summarily dismissed the claims relevant to this petition for review and denied Blackstock's motion to reconsider the denial of post-conviction relief on those claims. We will uphold the trial court's denial of post-conviction relief absent an abuse of the court's discretion. *State v. Schrock*, 149 Ariz. 433, 441, 719 P.2d 1049, 1057 (1986). We grant review but deny relief.

¶2 Blackstock first argues that, because he pled guilty to a nonexistent offense, based on due process and Rule 17.5, Ariz. R. Crim. P., the trial court abused its discretion by rejecting his request in this post-conviction proceeding that the court vacate the conviction and permit him to withdraw from his plea agreement in order to correct a "manifest injustice." *See* Ariz. R. Crim. P., 17.5 ("The court, in its discretion, may allow withdrawal of a plea of guilty . . . when necessary to correct a manifest injustice."). Blackstock bases his claim on the language of his plea agreement. The agreement identifies the charge in "amended count one" as "continuous sexual abuse of a child," in violation of A.R.S. § 13-1417, but states that Blackstock committed the offense "by engaging in three or more acts of SEXUAL ABUSE with [the victim]." Section 13-1417 provides that a person

commits continuous sexual abuse of a child if, during the requisite period of time and with a child under the age of fourteen, the person "engages in three or more acts in violation of § 13-1405 [sexual conduct with a minor], § 13-1406 [sexual assault], or § 13-1410 [molestation of a child]." Multiple acts of "sexual abuse" in violation of § 13-1404 do not provide a sufficient factual basis for a charge of continuous sexual abuse of a child.

¶3 At the change-of-plea hearing, however, Blackstock admitted having engaged in three acts of sexual conduct with the victim. Although initially Blackstock only admitted having touched the victim's breasts on three occasions, after his counsel conferred with the prosecutor and the state voiced its position that Blackstock's admissions did not supply a sufficient factual basis for the charge, Blackstock also admitted having "engaged in oral sexual conduct with [the victim] at least three times" by using his "mouth upon her vulva or her private parts . . . [f]or sexual purposes." It is uncontested that the victim was under fourteen at the time of these acts and that the acts were committed during the requisite period of time.

¶4 Based on this record, we conclude Blackstock did not plead guilty to a nonexistent offense. He pled guilty to, admitted a factual basis for, and was convicted of the statutory offense of continuous sexual abuse of a child. This case is, therefore, distinguishable from *State v. Sanchez*, 174 Ariz. 44, 846 P.2d 857 (App. 1993), and *State v. McClarity*, 27 Ariz. App. 571, 557 P.2d 170 (1976), on which Blackstock relies. In *Sanchez*, the defendant admitted to facts sufficient to prove he was guilty of conspiracy to sell narcotic

drugs, but his plea agreement reduced that charge to an attempted offense. 174 Ariz. at 45, 846 P.2d at 858. This court held that "the preparatory offense of attempt does not apply to the preparatory offense of conspiracy," and therefore, "[a]ttempted conspiracy . . . is not a cognizable offense." *Id*. at 47-48, 846 P.2d at 860-61. In *McClarity*, this court decided that the trial court had had no authority to accept a plea to "'theft of a motor vehicle' as an 'open-ended' offense" because the legislature had not designated it as such. 27 Ariz. App. at 576, 557 P.2d at 175. Blackstock's case is not similar.

¶5 Moreover, the wording of the plea agreement caused no "manifest injustice." The trial court fully explained the charge and the consequences of a guilty plea to Blackstock, and Blackstock clearly understood both. His contention that he "thought he was pleading to three counts of sexual abuse" is simply untenable on the record before us. At most, Blackstock might initially have been confused about what conduct he needed to admit in order to benefit from the terms of the plea agreement, but he clearly understood those terms. And any initial confusion was obviously ameliorated during the change-of-plea hearing. Blackstock hints that some sort of coercion may have taken place off the record during the change of plea hearing, but he provides no evidence to support any such claim.[1] Therefore, the record supports the trial court's finding that Blackstock's plea was knowing, voluntary,

[1]In the affidavit Blackstock submitted in support of his petition for post-conviction relief, he claimed merely that, had he known he was pleading guilty to an offense that "did not exist, [he] would not have entered into the plea agreement." As we have already explained, however, Blackstock did not plead guilty to a nonexistent offense.

and intelligent and that he was not entitled to post-conviction relief. *Cf. Mabry v. Johnson*, 467 U.S. 504, 509 (1984) ("only when it develops that the defendant was not fairly apprised of its consequences can his plea be challenged under the Due Process Clause").

¶6 Blackstock argues alternatively that his "counsel was ineffective in permitting [him] to plead guilty to the offense without informing him that the nature of the offense had changed." He urges us to "remand the case to determine whether counsel provided ineffective assistance." A claim of ineffective assistance of counsel requires a defendant to establish both that counsel's performance fell below prevailing professional norms and that the deficient performance resulted in prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Counsel could not have been ineffective for failing to inform Blackstock of a change in the nature of the offense that had not occurred and, as we have noted, the trial court fully explained to Blackstock the charge and consequences of the plea. Therefore, he has shown neither deficient performance nor prejudice.

¶7 Equally untenable is Blackstock's suggestion that the language used to describe his conduct rendered the plea agreement "improper" and the plea unenforceable. Rule 17.4(b), Ariz. R. Crim. P., requires "[t]he terms of a plea agreement shall be reduced to writing." Blackstock has cited no authority, and we have found none, that requires a factual basis for a charge be contained in the plea agreement at all or that, having included a factual basis, a plea agreement is unenforceable if the stated basis is insufficient. Rather, the court may determine the factual basis for a plea by considering "statements made by the

defendant; police reports; certified transcripts of the proceedings before the grand jury; and other satisfactory information." Ariz. R. Crim. P. 26.2(d); *see also* Ariz. R. Crim. P. 17.3. If after considering such information, a factual basis is not established, the trial court must reject the plea. But if a sufficient factual basis is established, it need not do so.

¶8 Next, Blackstock argues the trial court abused its discretion by refusing his request in his Rule 32 petition to withdraw from the plea agreement because the state breached a material term by requesting that he be placed on intensive probation supervision, a type of supervision he claims "can[not] be transferred to another state," and by making an off-the-record comment opposing his serving probation in Mississippi. If a defendant's guilty plea "rests in any significant degree" on a promise by the state, "that promise must be fulfilled." *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971). A defendant, however, has the burden of showing that the state made a material promise that it did not fulfill. *See* Ariz. R. Crim. P. 32.8(c) (at evidentiary hearing "defendant shall have the burden of proving the allegations of fact by a preponderance of the evidence"); *see also* Ariz. R. Crim. P. 32.6(c) (summary disposition permissible when defendant presents no "material issue of fact or law which would entitle the defendant to relief").

¶9 In this case, the plea agreement identified the statutory sentencing range for the sexual conduct charge as five to fifteen years in prison but provided probation was available for "up to [a] lifetime" term and that, "if sentenced to probation," Blackstock "may serve it

in Mississippi subject to approval of the Court and the Probation Department and subject to the terms of the interstate compact." Blackstock stated in an affidavit that "one of the important inducements for [his] entering the plea agreement was the likelihood of serving probation in Mississippi, and he claimed he "understood the phrase 'may be served'" to mean that, "if the court granted probation, [he] would be able to serve it in Mississippi."

¶10 "Plea agreements are contractual in nature and subject to contract interpretation." *Coy v. Fields*, 200 Ariz. 442, ¶ 9, 27 P.3d 799, 802 (App. 2001). "The construction of a contract is a question of law where the terms of the agreement are plain and unambiguous." *Smith v. Melson, Inc.*, 135 Ariz. 119, 121, 659 P.2d 1264, 1266 (1983); *cf. State v. Rivera*, 210 Ariz. 188, ¶ 22, 109 P.3d 83, 88 (2005) ("The interpretation of an assistant attorney general who was not a party to the plea agreement does not change the written terms of the agreement."). Blackstock's plea agreement contained no promise restricting the prosecutor's recommendation about the type or location of probation. Thus, the prosecutor's statements and requests were not "antithetical to the plea agreement's terms," as Blackstock claims. And the trial court did not abuse its discretion by denying relief on this claim.

¶11 Likewise, the trial court did not abuse its discretion in denying post-conviction relief based on Blackstock's claim that the court had failed to inform him that he had a right to withdraw from the plea agreement because the court had rejected one of its terms. Blackstock's argument on this claim is less than clear, but it appears premised on his

contention that, if placed on probation, he was entitled to serve it in Mississippi. As mentioned above, however, the agreement merely provided that Blackstock "may serve [probation] in Mississippi subject to approval of the Court and the Probation Department and subject to the terms of the interstate compact." Thus, the plea agreement acknowledged it was for the trial court to determine, in the exercise of its discretion, the location of probation supervision; the court did not abuse its discretion when it deferred, until after Blackstock had served his prison sentence, determining whether Mississippi would be an appropriate probation location. As the court noted in denying Blackstock's motion to reconsider the denial of post-conviction relief:

> [Blackstock] will need to complete his prison sentence on count [one] before he will begin his probationary term on count two. The resources available to a community to protect against the risk of recidivism by [Blackstock], as well as [Blackstock's] prognosis, will be matters tha[t] can be reviewed in the future and are matters that cannot be adequately predicted at this time. The court can consider [Blackstock's] request to reside and be supervised in another state, including Mississippi, upon his release from prison when the court is able to better assess the then existing resources available for his supervision in conjunction with his prognosis for recidivism.

¶12 Finally, Blackstock argues that Child Protective Services (CPS) "should not have been permitted to provide a victim impact statement" to the court at sentencing and that the caseworker's statement that Blackstock has "got to do prison time," as well as other unspecified statements, "might" have affected the trial court's sentencing decision. The same judge who sentenced Blackstock decided his petition for post-conviction relief. In denying

relief on this claim, the court found that the victim had been a child at the time of sentencing and was in the "legal care, custody and control" of CPS. It noted it had received, considered and assessed "information from both the CPS caseworker and a letter from the child victim," giving them "the input and weight they deserved." Thus, we need not determine the propriety of the caseworker's input because we conclude its exclusion would not have affected the sentence imposed.

¶13 Although we grant review, we deny relief.

_____
JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

_____
JOHN PELANDER, Chief Judge

_____
J. WILLIAM BRAMMER, JR., Judge